

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
MESTER'S TV)	File Nos. 312-CM-P-92; 313-CM-P-92
)	
To Construct New Multipoint Distribution Service)	
Stations On Channels 1 and 2A, Santa Barbara,)	
California)	

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 2003

Released: June 27, 2003

By the Commission:

1. *Introduction.* On February 22, 2000, Mester's TV ("Mester") filed an application for review¹ of the January 20, 2000, decision of the Video Services Division of the former Mass Media Bureau (Division). The Division's decision denied Mester's petition for reconsideration of the dismissal² of its January 2, 1992, applications for Multipoint Distribution Service (MDS) Channels 1 and 2A facilities in Santa Barbara, California. For the reasons discussed below, we grant Mester's application for review and reinstate the above-captioned applications.

2. *Background.* On March 22, 1991, the Commission granted Mester a license to operate MDS Station WNTA868, Santa Barbara, California.³ This license specified a transmitter site at coordinates 34-27-58 North Latitude, 119-40-37 West Longitude.⁴ On January 2, 1992, Mester filed three separate applications for new MDS stations on Channels 1,⁵ 2A,⁶ and H3⁷ at Santa Barbara, California. If another party had filed mutually exclusive applications, the Commission would have used lotteries to choose among the competing applicants. Each of Mester's applications specified the same transmitter site as the license for Station WNTA868,⁸ which was on file with the Commission.⁹ Additionally, Mester listed the antenna structure supporting Station WNTA868 as the structure where it would locate the

¹ Application for Review (filed Feb. 22, 2000) (AFR).

² Letter from Charles E. Dziedzic, Assistant Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission to John Mester (dated Jan. 20, 2000) (*Division Letter*).

³ See File No. 785-CM-P-77 (granted Mar. 22, 1991).

⁴ *Id.*

⁵ File No. 312-CM-P-92 (filed Jan. 2, 1992) (Mester Channel 1 Application).

⁶ File No. 313-CM-P-92 (filed Jan. 2, 1992) (Mester Channel 2A Application).

⁷ File No. 314-CM-P-92 (filed Jan. 2, 1992) (Mester Channel H3 Application). The three applications will be collectively referred to as the Mester 1992 Applications.

⁸ See responses to FCC Form 494, Page 2, Question 14(c).

⁹ See Mester 1992 Applications, Blocks 7(a)-(k); *Division Letter* at 1.

antennas for the proposed stations in the Mester 1992 Applications. Finally, Mester checked the “Site Leased” box for each application, but did not attach a copy of the site lease.¹⁰

3. Effective April 9, 1992, the Commission stopped accepting for filing all applications for new MDS facilities and amendments to those applications (freeze).¹¹ The filing freeze continued until 1995, when the Commission announced competitive bidding procedures for the remaining MDS spectrum on a geographic basis.¹² On April 29, 1993, the Domestic Facilities Division of the former Common Carrier Bureau returned Mester’s Channel 1 and 2A applications on the basis that the applications failed to demonstrate site availability in accordance with the provisions of Section 21.15(a) of the Commission’s Rules.¹³ The Return Notifications indicated that Mester could not resubmit the applications until the Commission terminated the filing freeze and that the Domestic Facilities Division would treat any corrected application as a newly filed application.¹⁴ On May 28, 1993, Mester requested reconsideration of the dismissal of its applications.¹⁵

4. On September 6, 1995, the Commission conditionally granted Mester’s Channel H3 application for Station WMX215.¹⁶ One of the conditions of the license required Mester to submit a fully executed deed, lease, or option agreement before the commencement of construction and by December 15, 1995.¹⁷

5. On January 20, 2000, the Division denied Mester’s Petition¹⁸ because the applications did not contain all technical information required by the application form¹⁹ and the applications did not clearly cross-reference the station file for Station WNTA868.²⁰ Mester filed its Application for Review on February 22, 2000.²¹

6. *Discussion.* In its AFR, Mester argues that its failure to provide a copy of its existing site lease was not grounds for a return and that it should have been given an opportunity to amend its

¹⁰ See January 2, 1992 applications.

¹¹ Amendment of Parts 1, 2, and 21 of the Commission’s Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, *Notice of Proposed Rulemaking*, 7 FCC Rcd 3266, 3270-71 ¶ 19 and n.35 (1992).

¹² Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, in MM Docket No. 94-131 and PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9569 (1995).

¹³ Application Return Notification dated April 12, 1993 from Robert James, Chief, Domestic Radio Branch, Domestic Facilities Division to Mester’s TV re: File No. 313-CM-P-92 (Channel MDS-1); Application Return Notification dated April 12, 1993 from Robert James, Chief, Domestic Radio Branch, Domestic Facilities Division to Mester’s TV re: File No. 312-CM-P-92 (Channel MDS-2A) (collectively, “Return Notifications”).

¹⁴ *Id.*

¹⁵ Mester Petition for Reconsideration (filed May 28, 1993) (Petition).

¹⁶ See License for Station WMX215 (AFR, Exhibit 4).

¹⁷ *Id.*

¹⁸ *Division Letter.*

¹⁹ *Id.* at 1.

²⁰ *Id.* at 1-2, *citing* 47 C.F.R. § 21.13 (1991).

²¹ AFR.

application to provide the site lease.²² We agree and will reinstate Mester's applications. In 1987, the Commission noted that applicants would have to demonstrate reasonable assurance of site availability, but that "in lottery situations it is unreasonable to expect all applicants to have a lease or written option for the proposed site."²³ The Commission further stated that it would require "concrete evidence of site availability" (*i.e.*, evidence of site ownership, a site lease, or an option to buy or lease) before it issued a license.²⁴ The Division's position in this case that failure to provide a site lease is grounds for returning an application is inconsistent with the Commission's observation that it was unreasonable to require such information at the time the application was originally filed. Moreover, Mester has shown that in other indistinguishable cases (including the Mester Channel H3 Application), the Division granted applications wherein the applicant failed to submit a copy of a site lease and required the conditional licensee to provide the site lease by a specified date.²⁵ We note that the Division previously has determined that not all site availability defects are grounds for return of an application.²⁶ Under these circumstances, we agree with Mester that the failure to submit the site lease with the original application alone was insufficient ground for returning the subject applications and that it should have been given the opportunity either to amend its applications to provide the site lease or to provide such information by a date certain post-conditional license grant.²⁷

7. In light of this analysis, we will reinstate Mester's applications and remand this proceeding to the Wireless Telecommunications Bureau²⁸ for processing of Mester's applications consistent with this *Memorandum Opinion and Order*. We decline to consider Mester's other arguments because it is unnecessary to reach those arguments.

8. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by Mester's TV on February 22, 2000 IS GRANTED.

²² AFR at 4-5. Mester further asserts that, though site leases were not attached, Mester's applications clearly demonstrate site availability. *Id.* Mester also claims that the Division has held in other cases that failure to provide a site lease is not grounds for returning an MDS application. *Id.* at 6, *citing* RuralVision South, Inc., *Order on Reconsideration*, 12 FCC Rcd 21721, 21723 n.5 (MMB VSD 1997); RuralVision Central, Inc., *Order on Reconsideration*, 11 FCC Rcd 7000, 7004 ¶ 13 (MMB VSD 1996); Allen Wheeler, *Order on Reconsideration*, 11 FCC Rcd 6955 n.3 (MMB VSD 1996). Mester also claims that the Division's action is inconsistent with the staff policy of granting applications and allowing applicants to file concrete evidence of site availability after grant of a conditional license (including Mester's Channel H3 application). *Id.* at 7; 9-10. Finally, Mester argues that the return of its applications was inconsistent with the public interest because it will have a "seriously deleterious effect on development of a competitively-viable MDS system in Santa Barbara." *Id.* at 10-11.

²³ Revision of Part 21 of The Commission's Rules, CC Docket No. 86-128, *Report and Order*, 2 FCC Rcd 5713, 5721 ¶ 57 (1987).

²⁴ *Id.*

²⁵ See AFR at Exhibit 6 (copies of conditional licenses requiring submission of site leases by a date certain after grant of the conditional license).

²⁶ RuralVision South, Inc., *supra*, RuralVision Central, Inc., *supra*, Allen Wheeler, *supra*.

²⁷ See *Salzer v. FCC*, 778 F.2d 869, 871-872 (D.C. Cir. 1985).

²⁸ Effective March 25, 2002, the Commission transferred regulatory functions for the Instructional Television Fixed Service and the Multipoint Distribution Service/Multichannel Multipoint Distribution Service from the Mass Media Bureau to the Wireless Telecommunications Bureau (Bureau). Radio Services Are Transferred From Mass Media Bureau to Wireless Telecommunications Bureau, *Public Notice*, 17 FCC Rcd 5077 (2002). Accordingly, the Bureau's Public Safety and Private Wireless Division assumed all regulatory duties associated with these services effective March 25, 2002. *Id.*

9. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), that Mester's TV's applications for Multipoint Distribution Service Channels 1 and 2A facilities in Santa Barbara, California, File Nos. 312-CM-P-92 and 313-CM-P-92, ARE REINSTATED AND REFERRED to the Wireless Telecommunications Bureau for further processing consistent with this *Memorandum Opinion and Order*.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary